In The

Supreme Court of the United States

October Term, 1970

No. ~~1480~~ 70-98

RUDOLPH SANTOBELLO,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.
Petition for Certiorari filed March 18, 1971
Certiorari granted May 29, 1971

BRIEF FOR PETITIONER

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INDEX TO BRIEF

Index

Table of Citations

CASES CITED:

STATUTE CITED:

APPENDIX

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Statement

This Brief is submitted in connection with the granting of certiorari in this case on May 29, 1971. The petitioner is seeking to obtain a reversal and vacation of the judgment of the Supreme Court of the State of New York, County of Bronx, which convicted him of the crime of possession of gambling records in the second degree (N.Y. Penal Law §225.15) upon his plea of guilty before Justice Abraham Gellinoff. The petitioner wishes to withdraw his plea of guilty and proceed to trial. Following a harangue by the Executive Assistant District Attorney asking for maximum punishment, which was contrary to an express promise made prior to the plea of guilty, the Trial Court did in fact sentence petitioner to the maximum term of incarceration permitted by law, namely one year.

Mr. Justice John Marshall Harlan of this Court, on the 16th day of February, 1971, granted petitioner bail pending the timely filing (by March 22, 1971) and disposition of the within petition for certiorari. Certiorari was granted May 29, 1971.

Opinion Below

No opinion was rendered by the Appellate Division in unanimously affirming the judgment of conviction. A copy of the decision of that Court is at page 40a of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3). A timely application for leave to appeal to the Court of Appeals of the State of New York was made but was denied by Associate Judge Adrian P. Burke in a certificate dated February 4, 1971, a copy of which is reprinted at page 41a of the Appendix.

The Questions Presented for Review

1. Whether defendant-petitioner, Rudolph Santobello, was denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution when he was fraudulently induced to plead guilty upon the promise of an Assistant District Attorney that no recommendation whatsoever would be made as to sentence, but that at the time of sentence a vehement supplication was made by the District Attorney to the Court requesting maximum punishment under law, which recommendation met with complete success since the Court imposed the severest penalty allowed by the law?

2. Whether the deliberate breaking of a promise made by a District Attorney to a defendant to induce a plea of guilty may be disregarded merely because this sentencing judge alleged that he was not influenced by the vehement recommendations for maximum sentence but proclaimed that he would have imposed the maximum sentence anyway? (North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160; Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970).

3. Whether the fact that a Public Prosecutor has induced a defendant to plead guilty by a false promise to withhold any recommendation as to sentence, ipso facto, requires vacating of the plea of guilty and a return of the defendant to his status quo ante?

The Prosecutor herein has conceded throughout that the promise to withhold recommendation as to sentence was indeed given and was in fact broken so there is no dispute about this issue upon this petition.

The Constitutional and Statutory Provisions Involved

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein as is New York Penal Law §225.15.

Statement of the Case

The statement of the case herein is going to be very brief because there is no issue of fact raised upon this brief. Even in the papers submitted to this Court in opposition to petitioner's application for bail, the District Attorney of Bronx County, representing the respondent herein, has conceded that the promise to withhold recommendation as to sentence at the time the defendant-petitioner, Rudolph Santobello, pleaded guilty was actually made and at the time of sentence that promise was clearly broken.

The petitioner herein was originally indicted for two felonies, namely promoting gambling in the first degree and possession of gambling records in the first degree. After a bargain was struck between his then attorney and an Assistant District Attorney (Mr. Greenfield), the defendant-petitioner was assured by Assistant District Attorney Greenfield, acting on behalf of the District Attorney's Office, that no recommendation as to sentence would be made if Santobello bargained away his rights by pleading guilty to the lesser charge of possession of gambling records in the second degree, a misdemeanor.

Only after this representation had been made was the plea of guilty to the lesser charge interposed in this case on June 16, 1969, before Mr. Justice Charles Marks. At the time of plea, contrary to uniform procedure and practice, the Court did not inquire of Santobello, as to whether any promises or threats had been made to him. cf: People v. Serrano, 15 N.Y. 2d 304, 258 N.Y.S. 2d 386. The sentencing, however, came on before a different judge, namely, Mr. Justice Abraham Gelinoff (Justice Marks having retired in the interim), on the 12th of January, 1970, at which time the District Attorney, through a different Assistant District Attorney, namely Mr. Seymour Rotker, recommended the maximum penalty provided by law (32a-35a[1]).

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1. Numerals in parenthesis refer to pages of the Petitioner's Appendix in this Court unless otherwise indicated.

The District Attorney at the time of sentence was not the least bit interested in what the probation report said (33a-34a) but intoned a harangue based upon hearsay which culminated in the following:

> "Your Honor, there is nothing that commends him for the Court's consideration. The People would ask that the Court deal stringently and harshly with this defendant by imposing a maximum sentence that the law can impose in such a case."

Mr. Joseph Aronstein who then represented the defendant-petitioner, Rudolph Santobello, informed the Court that testimony of an attorney was available to substantiate that Assistant District Attorney Greenfield had promised that no recommendation as to sentence would be made by the District Attorney at the time of sentence (34a). The Court refused to allow a withdrawal of the plea.

It should be noted again at this juncture that with commendable candor, the District Attorney has acknowledged that Assistant District Attorney Greenfield did in fact make such a promise.

In the District Attorney's Brief to the Appellate Division of the Supreme Court, Point I thereof (page 7) stated:

> "After reading defendant's brief, the undersigned looked into the matter and <u>we ascertained that Assistant District Attorney Greenfield had in fact stated to defense</u>

attorney Fruchtman before Santobello entered a guilty plea that the District Attorney's Office would remain silent at the sentencing of the defendant."

At the time of sentence petitioner's then attorney advised the Court that, in essence, the substance of the promise made by Mr. Greenfield influenced the plea of guilty.

As a matter of fact there cannot possibly be any doubt since this Court has in its possession already the response to the bail application in this matter wherein the District Attorney has again acknowledged that the promise was made and broken.[2]

It is incidental to the proceeding herein that the petitioner also sought relief by way of suppression of evidence and so forth since the only argument advanced herein is that a false promise was made by the District Attorney which induced a plea of guilty and since that actually is conceded to have occurred, the withdrawal of the plea of guilty is the only remedy which can rectify the wrong perpetrated.

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2. See response of respondent, herein, to application for bail pending certiorari, page 2, wherein the District Attorney again acknowledged the fact of the broken promise.

Argument

Point I

THE RESPONDENT, THE DISTRICT ATTORNEY OF BRONX COUNTY, MOST COMMENDABLY ACKNOWLEDGES THAT AN ASSISTANT DISTRICT ATTORNEY PROMISED, AT THE TIME OF THE PLEA OF GUILTY, THAT NO RECOMMENDATION AS TO SENTENCE WOULD BE MADE, AND FURTHER ADMITS THAT ANOTHER ASSISTANT DISTRICT ATTORNEY BROKE THAT PROMISE AT THE TIME OF SENTENCE BY RECOMMENDING THE IMPOSITION OF THE MAXIMUM PENALTY UNDER LAW, WHICH RECOMMENDATION THE COURT ACCEPTED SINCE IT ACTUALLY DID IMPOSE THE SEVEREST PENALTY ALLOWED BY THE LAW. THE ONLY REMEDY TO RECTIFY THIS INJUSTICE WHICH VIOLATES DUE PROCESS OF LAW, IS TO DIRECT THAT THE PETITIONER BE PERMITTED TO WITHDRAW HIS PLEA OF GUILTY.

Although we have already stated in an earlier portion of this brief that there is no dispute as to the facts, we again reiterate that neither party hereto disputes the events which occurred at the time of the plea of guilty, namely that Assistant District Attorney Greenfield promised that no recommendation as to sentence would be made, and that at the time of sentence, Assistant District Attorney Rotker, contrary to that promise recommended the maximum penalty allowed by the law. That recommendation was apparently enough despite the protestations of the sentencing judge to the contrary, since Santobello was given the maximum penalty allowed by statute, one year imprisonment.

It must be borne in mind that the issue here is not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation. The District Attorney concedes that the promise made at the time of the plea was not kept. Thus, irrespective of what sentence was imposed, due process of law requires that defendant-petitioner be permitted to withdraw his plea of guilty.

In Brady v. United States, 397 U.S. 742 at page 755, 90 S.Ct. 1463 (1970), this Court explained the standard of voluntariness which must be applied stating the following:

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:
>
> '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).' 242 F.2d at page 115." (Emphasis ours.)

See also North Carolina v. Alford, 400 U.S. 25. In Alford, this Court explained (400 U.S. at 31, 32):

> "Jackson [United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209] established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed. 2d 274 (1969); Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed. 2d 473 (1962); Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927)."

See, too, McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1969).

In Brady, this Court properly analogized the situation of a guilty plea to a judicial "confession." It noted that any confession which is obtained by a direct or implied promise, however slight, which is not fulfilled is involuntary. Thus, the opinion of this Tribunal explained (397 U.S. at 753):

> "Bram v. United States, 168 U.S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied prom-

> ises, however slight, nor by the exertion of any improper influence.' 168 U.S. at 542-543. More recently, Malloy v. Hogan, 378 U.S. 1 (1964), carried forward the Bram definition of compulsion in the course of holding applicable to the States the Fifth Amendment privilege against compelled self incrimination." (Emphasis ours.)

Point II

IT IS NOT MATERIAL WHETHER OR NOT THE DISTRICT ATTORNEY BELIEVES THE SENTENCE WAS FAIR SINCE THE ONLY ISSUE MATERIAL TO THIS PETITION IS WHETHER OR NOT THE PROMISE TO REFRAIN FROM MAKING ANY RECOMMENDATIONS WAS KEPT. BY ITS OWN ADMISSION THE RESPONDENT BROKE THIS PROMISE.

In Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), this Court noted that "fundamental fairness" is essential to preserve the due process rights of every citizen whether being tried in a state or federal forum.

In the case at bar, the District Attorney has conceded, as we have noted supra, that Assistant District Attorney Greenfield at the time of plea of guilty promised not to make any recommendation at the time of sentence but when sentence was pronounced, it was preceded by a lengthy harangue by Assistant District Attorney Rotker asking for the maximum punishment provided by law.

The respondent will perhaps again take the position, as it did in the Court below, that there is no evidence in the record itself that Assistant District Attorney Rotker had been informed of the promise prior to the time that he recommended the severest sentence.

Upon analysis, however, this argument is a "house of cards" because there is no doubt that a motion to withdraw the plea of guilty was made, and since the District Attorney's Office now acknowledges that one of its assistants did articulate the promise, the only fair thing to do, and the only action consistent with due process of law, would be to consent to permit petitioner to withdraw his plea of guilty. It would be a sad commentary indeed if a defendant was required to notify every member of the District Attorney's staff before he could rely upon a representation of one of the Assistant District Attorneys.

The mere articulation of such a premise reveals its absurdity. Mr. Greenfield was acting for the respondent.

The issue herein is not whether the sentence was fair or unfair and any attempt to distract this Court with an argument along those lines is palpably an effort to throw "dust" in this Tribunal's eyes. If the sentence had only been one day in prison, there would still be a basis for the relief requested once the acknowledgement that the promise had been made and broken was declared.

It is interesting to note that Santobello would face a substantially stiffer sentence if permitted

to go to trial on the original charges herein should a conviction eventuate. The petitioner is willing to take that risk.

In the Court below, the District Attorney noted that Petitioner did not specifically declare that he was "innocent" of the charges in the original indictment. The actions of the petitioner, however, in seeking to dismiss the indictment; in seeking to suppress evidence; and in seeking to withdraw his plea of guilty, are certainly sufficient circumstantial evidence of the fact that petitioner is declaring his innocence. In this brief, petitioner now declares that he is not legally guilty of any of the charges set forth in the indictment.

Because of the foregoing reasons and the commendably frank acknowledgements of the District Attorney that a promise to refrain from recommending any sentence was made and broken, the judgment of conviction should be vacated and petitioner should be given the right to withdraw his plea of guilty and go to trial.

Conclusion

The conviction should be vacated and petitioner should be permitted to withdraw his plea of guilty and stand trial.

Respectfully submitted,

IRVING ANOLIK

Attorney for Petitioner

APPENDIX

New York State Penal Law

§ 225.15 Possession of Gambling Records in the Second Degree

A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article:

1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise; or

2. Of a kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise; except that in any prosecution under this subdivision, it is a defense that the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself in a number not exceeding ten.

Possession of gambling records in the second degree is a class A misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.